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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 456

GULF STEVEDORE CORPORATION AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION,

Petitioners,

v.

LEE H. HOLLIS, DEPUTY COMMISSIONER OF LABOR, AND GABELUS PICARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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July 24, 1970

FIDELITY PRINTING COMPANY, INC., HOUSTON

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v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on May 5, 1970.

OPINIONS BELOW

The compensation order issued under the Longshoremen's and Harbor Workers' Compensation Act by Lee H. Hollis, Deputy Commissioner, Bureau of Employees' Compensation, Eighth Compensation District, is unreported, but is printed in Appendix B to this petition, *infra*, page 2a. The memorandum and order of the United States Dis-

trict Court for the Southern District of Texas, Houston Division, is reported at 298 F.Supp. 426 and is printed in Appendix C, *infra*, page 7a. The opinion of the United States Court of Appeals for the Fifth Circuit is unreported, but is printed in Appendix D, *infra*, page 17a.

JURISDICTION

The judgment sought to be reviewed from the United States Court of Appeals for the Fifth Circuit was entered on May 5, 1970, *infra*, Appendix E, page 19a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Sec. 1254(1).

QUESTION PRESENTED

Whether loss of vision should be measured under the Longshoremen's and Harbor Workers' Compensation Act with consideration for the corrective medical benefits of contact lenses.

STATUTORY PROVISIONS INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C.A., Sections 907(a), 908(c)(5), and 908(c)(16) (Appendix A, *infra*, page 1a).

STATEMENT OF THE CASE

This case involves an appeal from an award of compensation for the permanent loss of use of an eye made by the Deputy Commissioner administering the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et seq.

The basic facts are not in dispute. Claimant Gabelus Pillard was struck in his right eye by a rope while working as a longshoreman for Gulf Stevedore Corporation. As a result of the injury, a traumatic cataract developed in

Picard's right eye and the cataract was surgically removed. The cataract removal resulted in a 95 percent temporary loss of visual acuity in the eye. A replacement lens, however, usually restores normal usable vision to the eye. Following a successful operation, the claimant accidentally struck himself in the eye, causing vitreous clouding and delay in recovery. Had Picard not struck himself in the eye, he could have been restored to corrected vision of 20/20 before the Deputy Commissioner's hearing. The treating physician testified that the vitreous will clear, either spontaneously or by surgery. When the vitreous clears, a contact lens will be used and complete vision restored.

The petitioners requested the Deputy Commissioner not to proceed with the hearing on permanent loss of vision, but to continue the case so that an accurate medical appraisal of the restored usefulness of the right eye could be made. The Deputy Commissioner took the view that the employee was entitled to a scheduled award for permanent loss of vision in the right eye based upon vision remaining without a corrective lens, and in effect held that the restoration of vision by the use of a contact lens was immaterial for compensation purposes. The Deputy Commissioner proceeded with the hearing, found that the claimant for compensation purposes had permanently lost the use of the right eye, and made the corresponding award.

Petitioners perfected their appeal to the United States District Court, urging that the Deputy Commissioner is required to consider the benefits of corrective medical treatment in determining permanent loss of vision for statutory purposes, and, therefore, should have delayed the hearing until an accurate appraisal could be made of the benefit of a corrective lens. The District Court sustained the Deputy Commissioner's award.

Petitioners perfected their appeal to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered judgment on May 5, 1970, affirming the District Court. The Court of Appeals held that uncorrected vision is the proper standard for determining loss of vision under the Longshoremen's and Harbor Workers' Compensation Act.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The decision below is in direct conflict with the decision of the United States Court of Appeals for the District of Columbia on the proper interpretation of the Longshoremen's and Harbor Workers' Compensation Act.

The Court of Appeals for the District of Columbia in *Washington Terminal Co.* v. *Hoage*, 79 F.2d 158 (D.C. Cir. 1935), decided the identical question which was before the Fifth Circuit. In *Hoage*, the Court of Appeals held that the Deputy Commissioner erred in not considering the assistance of glasses in passing upon the extent of the claimant's vision loss. The court felt that the use of eye glasses as an aid to vision was "so commonly understood and employed" that it should be considered in determining subsection 908(c)(16) vision loss (79 F.2d at 161). The court below has held that no consideration should be given to corrective lens in measuring vision loss under the same statutory provision (Appendix D, p. 17a).

The Hoage decision is in accord with the New York decisions under the New York Compensation Law. The pre-Longshoremen's Act New York decisions uniformly interpret the loss of vision provision as requiring a consideration of corrective vision. *Bochecchio* v. *Charnin Contracting Co.*, 209 App. Div. 619, 205 N.Y.S. 350 (1924); *McNamara* v. *McHarg-Barton Co.*, 200 App. Div. 188, 192

N.Y.S. 743 (1922); *Cortina* v. *Lathrop & Shea Co.*, 191 App. Div. 928, 180 N.Y.S. 855 (1920); *Valentine* v. *Sherwood Metal Working Co.*, 189 App. Div. 410, 178 N.Y.S. 494 (1919); *Frings* v. *Pierce-Arrow Motor Car Co.*, 182 App. Div. 445, 169 N.Y.S. 309 (1918). In interpreting the Longshoremen's Act, substantial weight is given to the settled construction of the New York Compensation Law prior to the adoption by Congress of the Longshoremen's Act since the Longshoremen's Act was modeled after the New York Statute. H. R. Rep. No. 1190, 69th Cong., 1st Sess. 2 (1926); *Lawson* v. *Suwannee Food and Steamship Co.*, 336 U.S. 198, 205 (1949); *Case* v. *Pillsbury*, 148 F.2d 392 (9th Cir. 1945); *Employer's Liability Assur. Corp.* v. *Monahan*, 54 F.2d 130 (1st Cir. 1937); *Bethlehem Ship Building Corp.* v. *Monahan*, 54 F.2d 349, 350 (1st Cir. 1931); *Texas Employers' Insurance Association* v. *Shed*, 410 F.2d 56, 70 (5th Cir. 1969).

2. The nonrecognition of corrective devices will undermine a major purpose of an important Federal Statute.

The Longshoremen's and Harbor Workers' Act is an important statute which should be carefully and uniformly interpreted. *Czaplicki* v. *The Heogh Silvercloud*, 351 U.S. 525 (1956).

As the district court stated (Appendix C, p. 13a), the statute is to be liberally construed so as to insure proper compensation. It should not, however, be construed to work undue hardship on an employer. *Reed* v. *SS YAKA*, 373 U.S. 410 (1963); *Voris* v. *Eikel*, 396 U.S. 328 (1953). Under Section 907(a) of the Act, the employer "must furnish such medical treatment as the nature of the injury or the process of recovery may require." Requiring the employer to pay compensation for permanent loss of vision while simultaneously paying for restoration of vision, such as through medical corrective lenses, seems unfair. The Act

must be interpreted and enforced so as to avoid such unfairness. *Pacific S.S. Co. v. Pillsbury*, 52 F.2d 686, 788 (S.D. Cal. 1931), aff'd 56 F.2d 79 (9th Cir 1932).

The Act is designed to encourage prompt aid on the part of an employer. *McCabe Inspection Service, Inc. v. Willard*, 240 F.2d 942 (2d Cir. 1951). An employer may be hesitant to provide immediate corrective medical treatment if the beneficial results of such treatment will not be considered in making compensation awards. Moreover, an award based upon permanent loss of vision and a finding of maximum recovery indicate that the process of recovery has been completed, and that the employer's duty to provide medical treatment is terminated. The claimant often may find a greater compensation in having corrective treatment adequately and fully provided than in receiving the scheduled payment and no further subsidized medical service.

The district court opinion adopted by the Fifth Circuit disregards the basic principles of the Longshoremen's Act, conflicts with the well-reasoned opinion of the Court of Appeals for the District of Columbia, and portends either an inequitable or less effective administration of an important federal statute.

CONCLUSION

For the foregoing reasons it is urged that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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July 24, 1970